NO. 82-1651

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in deciding an issue which was raised and argued in the District Court and the Court of Appeals, and which the State agreed the Court of Appeals should decide.

2. Whether the Court of Appeals, in determining whether evidence that was obtained as the direct result of violations of the Sixth Amendment nevertheless was constitutionally admissible at trial, properly considered the lack of good faith of the law enforcement officer who committed those violations.

3. Whether the Court of Appeals properly concluded that the state had not shown that a police officer had acted in good faith when the officer interrogated a defendant in the absence of counsel, in violation of an agreement with the defendant's attorney, and in an admittedly intentional and purposeful attempt to obtain as much incriminating information as possible before the defendant could reach his attorney.

4. Whether this Court should consider the validity and proper scope of the so-called "inevitable discovery" doctrine in a case in which the application of that doctrine, even in its broadest form, would still uphold the result reached by the Court of Appeals.

5. Whether this Court should consider extending the holding in Stone v. Powell to Sixth Amendment violations in a case in which the defendant in any event did not receive a full and fair opportunity to litigate his claims in the state courts.

6. Whether this Court should extend the holding in Stone v. Powell to bad faith Sixth Amendment violations.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

Since the filing of the Petition, the opinion of the Court of Appeals has been reported at 700 F.2d 1164.

STATEMENT OF THE CASE

Since most of the underlying facts in this case are recounted in this Court's opinions in Brewer v. Williams, 430 U.S. 387 (1977), they require only brief attention here. On December 24, 1968, ten year-old Pamela Powers disappeared from the Des Moines, Iowa, YMCA. Suspicion focused on Respondent Williams, and a warrant for his arrest on a charge of "child-stealing" was filed in state court. On December 26, acting on the advice of his attorney, Henry T. McKnight, Williams surrendered to the police in Davenport, Iowa, where he was arraigned on the warrant. Later on the

same day, Detective Cletus Leaming and another Des Moines police officer drove to Davenport to pick up Williams and return him to Des Moines. 430 U.S. at 390-391.

Before leaving Des Moines, Leaming agreed with Williams' attorney that Williams would not be questioned on the return trip. Nevertheless, during the trip from Davenport to Des Moines, Leaming initiated a conversation with Williams that Leaming later conceded was purposefully designed to elicit as much incriminating information as possible from Williams before he could reach his attorney. Leaming's efforts included an appeal to Williams' religious sympathies and statements that he and Williams should stop on the way to Des Moines and locate the body of the victim. Williams complied with these suggestions, and led Leaming and other police officers to the body. 430 U.S. at 391-393.

At Williams' first trial, the State introduced into evidence Williams' statements to Leaming. The resulting conviction was affirmed by the Iowa Supreme Court. State v. Williams, 182 N.W. 2d 396 (1970). However, in a habeas corpus proceeding, the United States District Court for the Southern District of Iowa reversed the conviction, holding that Leaming had violated Williams' Fifth and Sixth Amendment rights. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974). Both the Eighth Circuit Court of Appeals, Williams v. Brewer, 509 F.2d 227 (1975), and this Court, Brewer v. Williams, supra, affirmed the District Court's reversal.[1]

At Williams' retrial, the State sought to introduce evidence derived from the victim's body under a so-called "inevitable discovery" exception to the exclusionary rule. The trial court upheld this effort, finding that the body probably would have been found by searchers even if Leaming had not vioalted Williams' con-

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[1] This Court's holding reached only the Sixth Amendment violation. 430 U.S. at 397-98.

stitutional rights. Williams' subsequent conviction was upheld by the Iowa Supreme Court. State v. Williams, 285 N.W. 2d 248 (1979). That court articulated a two-pronged inevitable-discovery doctrine under which the State was required to show (1) that the challenged evidence probably would have been discovered in the absence of the underlying constitutional violation, and (2) that the constitutional violation was committed in good faith. It then held that the State had satisfied both prongs. 285 N.W. 2d at 260.

Williams again sought habeas corpus relief in the District Court on a number of grounds, including a multi-level challenge to the Iowa Supreme Court's application of the "inevitable discovery" doctrine. The District Court denied the petition. Williams v. Nix, S.D. Iowa No. 80-450-D, Dec. 18, 1981 (Pet. at A68). However, on appeal the Eighth Circuit Court of Appeals reversed the judgment of the District Court. Williams v. Nix, 700 F.2d 1164 (1983) (Pet. at A1). The Court of Appeals confined its opinion to a single issue: inevitable discovery. Although it declined to decide "whether to recognize the inevitable-discovery or hypothetical-independent-source exception to the rule excluding evidence obtained in violation of the Sixth Amendment right to counsel," the Court of Appeals did hold that "if there is to be an inevitable-discovery exception the State should not receive its benefit without proving that the police did not act in bad faith." 700 F.2d at 1169 (Pet. at A93-A10). The Court of Appeals then held that the State had failed to show lack of bad faith. 700 F.2d at 1171-1173 (Pet. at A10-A17).

SUMMARY OF ARGUMENT

1. Contrary to the State's assertions, it had ample notice of the "good faith" issue on which the Court of Appeals decided this case: The Iowa Supreme Court announced good faith as an element of its hypothetical inevitable discovery doctrine; Williams and the State raised and argued Leaming's good faith both in the District Court and in the Court of Appeals; and the State specifically argued that the Court of Appeals should decide the good faith issue.

2. The decision of the Court of Appeals was correct under Brown v. Illinois, 422 U.S. 590 (1975), and Dunaway v. New York, 442 U.S. 200 (1979). Williams led Leaming to the body soon after the violation of his rights; there were no intervening circumstances; and Leaming's intentional elicitation of incriminating information before Williams could consult with his attorney -- in violation of Leaming's agreement with that attorney -- was flagrantly unconstitutional.

3. This Court need not consider or decide the validity of any inevitable-discovery doctrine in the context of this case, since the Court of Appeals was correct in holding (a) that any valid inevitable-discovery doctrine must include a good faith element and (b) that good faith was not established. Good faith is a particularly important issue under the "attenuation" exception to the exclusionary rule under Brown v. Illinois and Dunaway v. New York, supra, and there is no reason why it should be any less an issue under any inevitable-discovery exception. Moreover, permitting the introduction of evidence derived from bad faith violations of the Sixth Amendment would remove the incentive for the police to use legal means to obtain such evidence, and would impugn the integrity of the judicial process.

4. The Court of Appeals was correct in concluding that Leaming did not act in good faith. This Court's decision in Brewer v. Williams, 430 U.S. 387 (1977), established that Leaming intentionally and purposefully sought to elicit incriminating information from Williams before he could reach his attorney, and that this was in violation of an agreement with that attorney. Especially in light of Massiah v. United States, 377 U.S. 201 (1963), Leaming could not have believed, reasonably or otherwise, that this conduct did not violate Williams' Sixth Amendment rights. Consequently, Leaming's good faith was established under a "subjective" or an "objective" standard.

5. A grant of certiorari in this case also would be inappropriate because even if an inevitable-discovery doctrine without a good faith element were valid, the result reached by the Court of Appeals would stand. Additional evidence introduced in the District Court established (a) that the search for the victim's body that was initiated two days after her disappearance would not have extended into Polk County, where the body was located, and (b) that even if the search had extended into Polk County, searchers would not have been able to see the body. Thus, even application of the broadest possible inevitable-discovery doctrine would affirm the judgment of the Court of Appeals.

6. This is not an appropriate case for this Court to consider an extension of Stone v. Powell, 428 U.S. 465 (1976), beyond the Fourth Amendment context. The holding and rationale of Stone were carefully limited to the judicially-created exclusionary rule for Fourth Amendment violations. See also Rose v. Mitchell, 443 U.S. 545 (1978). Unlike the claimed Fourth Amendment violations in Stone, the Sixth Amendment violations in this case involved personal rights, and directly affected the integrity of the judicial process. Moreover, extension of Stone would be especially inappropriate in this case because the con-

stitutional violations were not committed in good faith. Finally, application of Stone to this case would not change the result in any event, since Williams did not have a full and fair opportunity to litigate his claims in the state courts.

REASONS FOR DENYING THE WRIT

I. THE STATE HAD AMPLE NOTICE OF, AND LITIGATED, THE "GOOD FAITH" ISSUE IN THE DISTRICT COURT AND COURT OF APPEALS.

As noted previously, the Court of Appeals did not reach the question of whether the "inevitable discovery" doctrine applied by the Iowa Supreme Court was constitutionally valid. However, the Court of Appeals did hold that if an inevitable-discovery doctrine was to be recognized, it must include a "good faith" element, and that the State had failed to show that Detective Leaming acted in good faith when he committed the violations of Williams' constitutional rights that led to the discovery of the evidence in question.

The State's first,and lengthiest, complaint about the decision below is that the State had no "real notice" of the "good faith" issue on which the Court of Appeals based its holding, and that that issue should have been remanded to the District Court for a "limited evidentiary hearing . . . ." (Pet. at 8-9). This complaint is totally without merit because the State in fact had ample notice of the "good faith" issue -- and argued it on the merits -- throughout the proceedings in the District Court and the Court of Appeals:

1. Prior to the filing of the petition for a writ of habeas corpus in the District Court, the Iowa Supreme Court identified "good faith" as a critical element in the hypothetical inevitable-discovery doctrine it applied. 285 N.W. 2d at 260.

2. The initial memorandum that was filed in the District Court in support of the petition for a writ of habeas corpus

raised the lack-of-bad faith element of the Iowa Supreme Court's hypothetical inevitable discovery test. (Memorandum filed Mar. 30, 1981, p. 21). Moreover, in urging that this Court's decision in Brown v. Illinois, 422 U.S. 590 (1975), required reversal of the Iowa Supreme Court's inevitable-discovery decision, Williams argued in the District Court that Detective Leaming's conduct was a flagrant violation of his rights. (Id. at 25). Since "flagrancy" is simply the opposite of "good faith," Dunaway v. New York, 442 U.S. 200, 221, 226 (1979), State v. Williams, 285 N.W. 2d 248, 259 (Ia. 1979), this argument certainly gave notice that Detective Leaming's lack of good faith was an issue.

3. The State explicitly dealt with the "good faith" issue, in its initial brief in the District Court, arguing that Detective Leaming did act in "good faith." (Brief filed April 1, 1981, pp. 11-12).

4. The District Court not only recognized the "good faith" element, but also upheld the inevitable-discovery test articulated by the Iowa Supreme Court in part "because the test requires an absence of bad faith on the part of the police . . . ." (Pet. at A77).

5. Although Williams' opening brief in the Court of Appeals argued that Detective Leaming did not act in good faith (Appellant's Brief at 24), the State at no time complained that it had not received notice of that issue in the District Court. Instead, the State's Brief in the Court of Appeals directly addressed the "good faith" issue on its merits (Appellee's Brief at 22). Moreover, at oral argument counsel for the State explicitly and repeatedly took the position that the State should have the burden of establishing good faith, and that the State had done so. 700 F.2d at 1169, n.5; 1174-1175 (Pet. at A10, n.5; A24-A26).

Given the facts outlined above, the State's reliance on Justice Powell's concurring opinion in Brewer v. Williams, 430 U.S. 387, 414, n.3 (1977) (Pet. at 8-9), is totally misplaced. In

Brewer, Justice Powell declined to consider the applicability of Stone v. Powell, 428 U.S. 465 (1977), because it had never been mentioned in any of the briefs, even though the State's Reply Brief had been filed after Stone was decided. In the instant case, by contrast, the "good faith" issue had been raised in the District Court and was briefed by both parties in the Court of Appeals prior to oral argument.[2]

In sum, the State had ample notice that Detective Leaming's good faith was an issue, and consistently pursued the strategy in the District Court and Court of Appeals of arguing that good faith was established on the record before those courts. Consequently, the State's argument for a remand for a "limited evidentiary hearing" is without merit.

II. THE DECISION OF THE COURT OF APPEALS WAS CORRECT UNDER PRIOR DECISIONS OF THIS COURT.

This Court also should deny the petition for a writ of certiorari because the decision of the Court of Appeals -- viz., that the evidence at issue should have been excluded because it was obtained as the direct result of acts by a state law enforcement officer that (a) violated the Sixth Amendment and (b) were not committed in "good faith" -- plainly was correct under Brown v. Illinois, 422 U.S. 590 (1975), and Dunaway v. New York, 442 U.S. 200 (1979).

In Brown, the defendant was arrested, without probable cause, at about 7:45 p.m. Following repeated Miranda warnings, he gave two incriminating statements, first at about 9:00 p.m., and then between 2:00 and 3:00 a.m. the following day. This Court reversed Brown's conviction, holding tht both statements were fruits of the illegal arrest, and that neither the Miranda warnings nor any other factors sufficiently attenuated the taint of

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[2] For similar reasons, the State's references to Jackson v. Denno, 378 U.S. 478 (1964), and United States v. Wade, 388 U.S. 218 (1967) (Pet. at 10-11) also are misplaced.

the illegality. 422 U.S. at 604-605.

In Dunaway, the defendant was taken into custody without probable cause and interrogated after he was given Miranda warnings. The defendant waived counsel and eventually made statements that incriminated him. Holding that Dunaway was "virtually a replica of" Brown, this Court held that the defendant's statements were illegal fruits of the unconstitutional seizure of the defendant, and that neither the fact that the police had complied with Miranda nor the fact that the defendant's statements were voluntary attenuated the taint of the initial illegality. 442 U.S. at 218-219.

In both Brown and Dunaway, this Court's focus was on the actual causal connection between the initial constitutional violations and the evidence derived therefrom. This Court specifically eschewed any simple "but for" causal test; rather, the question was whether the challenged evidence was obtained through exploitation of the primary illegality. In determining that question, three factors were to be considered: (1) the "temporal proximity" of the illegality and the evidence; (2) "the presence of intervening circumstances"; and (3) "particularly, the purpose and flagrancy of the official misconduct . . . ." This Court noted specifically that "the burden of showing admissibility rests, of course, on the prosecution." 422 U.S. at 603-604; 442 U.S. at 218.

An examination of these factors in the instant case leaves no doubt as to the correctness of the result reached by the Court of Appeals. First, the "temporal proximity" of the unconstitutional statements and the discovery of the body was as close as that in Brown and Dunaway. Second, there were no intervening circumstances between the violation of Williams' constitutional rights and the discovery of the body. Third, the official misconduct in the instant case was especially flagrant. As this Court held in Brewer v. Williams, 430 U.S. 387 (1977), Leaming had agreed with Williams'

retained counsel, Mr. McKnight, that he would not interrogate Williams on the return trip from Davenport to Des Moines. Nevertheless, Leaming embarked on a course of conduct which he admitted was purposefully designed to elicit as much incriminating information as possible from Williams before he could reach McKnight. 430 U.S. at 391, 399. In both Brown and Dunaway, this Court held that the initial official misconduct was flagrant because "the arrest without probable cause had a 'quality of purposefulness' in that it was an 'expedition for evidence' admittedly undertaken 'in the hope that something might turn up.'" Dunaway v. New York, supra, 442 U.S. at 218, quoting from Brown v. Illinois, supra, 442 U.S. at 605. Similarly in the instant case, Leaming's unconstitutional conduct was a pureposeful expedition for evidence admittedly undertaken in the hope that something incriminating would turn up.

"Flagrancy" is of course simply the opposite side of the coin of "good faith." Dunaway v. New York, supra, 442 U.S. at 221, 226. Consistently with the above analysis, the Court of Appeals persuasively demonstrated that Leaming did not act in "good faith." 700 F.2d at 1170-1173 (Pet. at A11-A17). Given Leaming's agreement with Williams' attorney, the fact that judicial proceedings had been initiated through Williams' arraignment on an arrest warrant, and the prior existence of Massiah v. United States, 377 U.S. 201 (1964), it cannot reasonably be said that Leaming acted in "good faith" when he purposefully set out to elicit incriminating information from Williams before he could get to his attorney. (See Division IV, infra).

III. THE COURT OF APPEALS' CONCLUSION THAT ANY VALID "INEVITABLE DISCOVERY" DOCTRINE MUST INCLUDE A "GOOD FAITH" ELEMENT WAS CORRECT, AND DID NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS.

This Court has not decided the validity of any "inevitable discovery" exception to the exclusionary rule in the Fourth, Fifth, or Sixth Amendment context. United States v. Crews, 445 U.S. 463, 475, n.22 (1980). However, this Court's decisions regarding the evidentiary "fruits" of constitutional violations strongly suggest the impropriety of such an exception, since those decisions uniformly have determined the admissibility of challenged evidence on the basis of whether the evidence "has been come at by exploitation of [illegal conduct] or instead by means sufficiently distinguishable to be purged of the primary taint," Wong Sun v. United States, 371 U.S. 471, 488 (1964) (emphasis added) -- not on the basis of whether the evidence hypothetically would have been discovered if the primary illegality had not occurred. See also Division II, supra; United States v. Wade, 388 U.S. 218, 240 (1967).[3]

In any event, this Court need not, and should not, reach the issue of the validity of an inevitable-discovery doctrine in this case. Even assuming, as the Court of Appeals did, that some inevitable-discovery doctrine is constitutionally valid, the evidence in question here was inadmissible because Leaming did not act in good faith when he purposefully violated Williams' constitutional rights.

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[3] Recognition of any hypothetical inevitable discovery doctrine would seriously emasculate the purposes of the exclusionary rule. Under that doctrine, even if the police were able to obtain evidence by legal means, there would be little incentive for them to use such means, rather than more "convenient" illegal means, since the evidence would be admissible in any event. Application of the hypothetical inevitable-discovery doctrine also would involve a highly subjective and ambiguous "factual" inquiry, and hence a high potential for abuse.

In this regard, the State's petition for certiorari complains that the Court of Appeals erred in including a "good faith" element in the inevitable-discovery doctrine that it assumed to be valid. Given this Court's prior decisions, however, this complaint has no merit. In applying the "attenuation" doctrine to determine whether the "but-for" fruits of unconstitutional conduct may be admitted into evidence, this Court has made it clear that the flagrancy of the primary illegality is a "particularly" important factor. Brown v. Illinois, supra, 422 U.S. at 603-604; Dunaway v. New York, supra, 442 U.S. at 218. As noted previously, flagrancy is simply the opposite side of the coin of good faith. Id. at 221, 226. If an inevitable-discovery exception to the exclusionary rule is to be recognized at all, there simply is no less reason to consider good faith under that exception than under the "attenuation" doctrine.

Indeed, since the emasculating effects on the purposes of the exclusionary rule of the hypothetical inevitable discovery doctrine are potentially more far-reaching than those of the attenuation doctrine, there is more reason to include a "good faith" element in the former than in the latter. If the fruits of even bad faith violations of constitutional rights were made admissible simply upon a showing that the evidence more likely than not would have been discovered anyway, there would be little disincentive to the intentional use of unconstitutional means to gather evidence, rather than less convenient constitutional means.

The preceding analysis applies with special force when the primary illegality is a violation of the Sixth Amendment, rather than the Fourth Amendment. Since Sixth Amendment violations necessarily occur after the initiation of formal judicial proceedings, Kirby v. Illinois, 406 U.S. 682 (1972), bad faith police conduct in the Sixth Amendment context directly affects the integrity of the judicial process. Cf. Stone v. Powell, 428 U.S. 465, 479 (1977); see Division VI, infra.

With regard to the good faith issue, nothing in the Court of Appeals' decision is inconsistent with the circuit court decisions cited by the State (Pet. at 11-12). The most obvious reason why this is so is that in none of those cases -- Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964), United States v. Brookins, 614 F.2d 1037 (5th Cir. 1980), United States v. Schmidt, 573 F.2d 1057 (1978), and Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974) -- was any question raised as to the good faith of the law enforcement officers (or as to the relevance of good faith).[4] That the failure of a court to discuss "good faith" in a particular case does not imply that it is not a proper element of an inevitable discovery-type inquiry is illustrated by the Second Circuit's decision in United States v. Alvarez-Porras, 643 F.2d 54 (1981). In Alvarez-Porras, one defendant argued that certain evidence seized from his apartment should have been suppressed as fruits of an illegal search. The court rejected this argument -- even though it found that an illegal warrantless search "led immediately to the seizure of the bulk of the incriminating evidence"-- because the police believed that a warrant had been signed, temporarily discontinued their search when they discovered they were mistaken,and then continued the search only

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[4] Although the lack of any "good faith" issue in the cases cited by the State is sufficient to dispose of them for purposes of the pending petition for certiorari, it may be useful to note that they are distinguishable for other reasons as well. First, in Killough, the court was careful to point out that the "evidence" at issue in no way connected the defendant to the crime; the same cannot be said in the instant case. Second, in Brookins, the court's references to the inevitable discovery doctrine were pure dictum; moreover, Brookins involved the discovery of a witness, rather than physical evidence -- a distinction which this Court emphasized in United States v. Ceccolini, 435 U.S. 268, 276-77 (1978). Third, in Schmidt, the inevitable discovery doctrine was discussed purely by way of dictum in a footnote -- and the Ninth Circuit subsequently has made it clear that Schmidt did not indicate that that court had adopted the doctrine. United States v. Hoffman, 607 F.2d 280, 285 (9th Cir. 1979). Fourth, in Gereau, the court required the government to show that the challenged evidence was not found as a result of the primary illegality by clear and convincing evidence, 502 F.2d at 927 -- a far more stringent standard than that used by the Iowa Supreme Court and advocated by the State.

after a signed warrant actually arrived. In so holding, the court emphasized the good faith of the police officers, 643 F.2d at 65, even though previous Second Circuit decisions had not mentioned this as a factor, see 643 F.2d at 61-62.[5]

In connection with the "good faith" issue, the State specifically complains that "there is no clear authority for the proposition that the inquiry is subjective in nature[,] as assumed by the panel in this case." (Pet. at 12). However, the issue of whether "good faith" is a subjective or objective inquiry does not provide any basis for the granting of certiorari in this case, for at least two reasons.

First, as Division IV, infra, discusses in some detail, even if the inquiry is purely objective, the record and the logic of the Court of Appeals' opinion demonstrate that the State failed to meet its burden; indeed, if anything the correctness of the Court of Appeals' decision is even more obvious under an objective standard.

Second, this Court's decisions concerning the "good faith" defense to §1983 claims imply that "good faith" should have both an objective and a subjective aspect in the context of the instant case. In Wood v. Strickland, 420 U.S. 308 (1975), this Court held that an official sued under §1983 would not have a valid good faith defense if he

> knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [plaintiff], or if he took the action with malicious intention to cause a deprivation of constitutional rights or other injury . . . .

422 U.S. at 321-22 (emphasis added). See also Procunier v.

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[5] In Alvarez-Porras, the Second Circuit explicitly declined to approve any so-called "inevitable discovery" theory, relying instead on "the principles underlying the exclusionary rule," as articulated in Wong Sun v. United States, supra, and on "the narrow showings made at the suppression hearing." 643 F.2d at 63-65. As Division II, supra, demonstrates, the same approach in the instant case leads to the same result reached by the Court of Appeals.

Navarette, 434 U.S. 555, 562-563, 566 (1978). As the State suggests (Pet. at 12), it is true that in Harlow v. Fitzgerald, _____ U.S. _____, 102 S.Ct. 2727 (1982), this Court held that bare allegations of malice would not suffice to overcome a good faith defense in §1983 claims, thereby eliminating the subjective element in such cases. However, the sole rationale for this holding was that the factual question of an official's malicious intention was not ordinarily resolvable on summary judgment, and therefore the subjective element of the good faith defense in §1983 actions as a practical matter exposed officials to undue burdens connected with pre-trial discovery and trial itself. 102 S.Ct. at 2737-2739. Obviously, the rationale of Harlow does not apply to the criminal trial process: Law enforcement officers generally are not subject to pre-trial discovery in criminal cases; and even under a purely objective good faith standard, an evidentiary hearing still would be required (since criminal pre-trial procedures do not include any equivalent to summary judgment).

Given Wood v. Strickland and Procunier v. Navarette, supra, the Court of Appeals' use of a subjective good faith standard was proper -- although the Court of Appeals also could have used an objective standard. Any in any event, the "subjective" inquiry of the Court of Appeals -- whether Leaming believed he was violating Williams' Sixth Amendment rights -- did not differ significantly, if at all, from the "objective" inquiry, left intact by Harlow, see 102 S.Ct. at 2737, 2740, of whether the official in question knew that his conduct violated the constitution.

In sum, the Court of Appeals' "good faith" inquiry was correct under this Court's prior decisions. As the following Division will show, the Court of Appeals' answer to this inquiry also was correct, under either an objective or a subjective standard.

IV. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT DETECTIVE LEAMING DID NOT ACT IN GOOD FAITH.

Having correctly decided that the State could prevail on an inevitable-discovery theory, if at all, only upon a showing that Leaming acted in good faith when he violated Williams' constitutional rights, the Court of Appeals went on to hold that such a showing had not been made. As the Court of Appeals' careful opinion itself demonstrates, 700 F.2d at 1171-1173 (Pet. at A13-A17), this holding was correct; and this is so regardless of whether good faith is regarded as a "subjective" or "objective" issue.

A. From what the Court of Appeals characterized as a "subjective" point of view, all of the evidence in the record directly contradicts any notion that Leaming acted under an honest belief that he was not violating Williams' rights. Indeed, given the facts already established in this Court's holding in Brewer v. Williams, supra, lack of good faith is essentially a foregone conclusion. Like every court that has reviewed this case, this Court found that before he left Des Moines to pick up Williams in Davenport, Leaming made an agreement with Williams' attorney that he would bring Williams straight back to Des Moines without questioning him. 430 U.S. at 391, 410, 415. As soon as Williams was isolated from counsel, however, Leaming broke this agreement by purposefully and intentionally attempting to obtain as much incriminating information as possible -- including the location of the body -- before Williams could reach his attorney. 430 U.S. at 399, 407-408, 411-412.[6]

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[6] As the Court of Appeals noted, 700 F.2d at 1172 (Pet. at A15), the record would not support any attempt to "justify" Leaming's actions on the ground that he was hoping to find the victim alive. That the State does not suggest that it could prove such a reason for Leaming's conduct is hardly surprising, since Leaming insisted at the first trial that Williams' attorney had told him that the victim was dead (App. to Brewer v. Williams, supra, at 96-97), and told Williams that they should stop and locate "the body" in order to ensure a "Christian burial" (430 U.S. at 393).

Especially given Massiah v. United States, 377 U.S. 201 (1963), which this Court has held to be "constitutionally indistinguishable" from this case, 430 U.S. at 400, it could not reasonably be inferred that Leaming did not realize that intentionally and designedly attempting to elicit evidence from a defendant before he could reach his attorney -- in violation of an agreement with the attorney -- would be unconstitutional. This conclusion is supported by Leaming's false denials that he had made an agreement with McKnight and that he had refused to permit another attorney, Mr. Kelly, to accompany Williams from Davenport to Des Moines. 700 F.2d at 1173 (Pet. at A16-A17).

B. Under an "objective" view of "good faith," the factors discussed in the preceding paragraphs and in the Court of Appeals' opinion lead even more ineluctably to the conclusion that Leaming did not act in good faith. As this Court indicated in Harlow v. Fitzgerald, supra, objective good faith is not established if the relevant state official either knew or reasonably should have known that his conduct would violate the Constitution. The "objective" question of whether Leaming in fact knew that his conduct would violate Williams' Sixth Amendment rights is at least very close to (if not the same as) the "subjective" question which the Court of Appeals asked: whether Leaming believed that his conduct would violate the right to counsel. Clearly, the answer to the former question must be the same as the answer to the latter. Similarly, particularly in light of Massiah v. United States, it is clear that Leaming reasonably should have known that intentionally and designedly eliciting as much incriminating evidence as possible from Williams before he could consult with his attorney, in direct violation of an express agreement with that attorney, would violate the Sixth Amendment.[7]

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[7] The same result also follows from application of this Court's holdings in Brown v. Illinois and Dunaway v. New York, supra. See Division II, supra.

C. As the Court of Appeals noted, 700 F.2d at 1170 (Pet. at A11-A12), the theory espoused by the State (Pet. at 13) and the Iowa Supreme Court (285 N.W. 2d at 260) that Leaming acted in good faith simply because a substantial percentage of the judges and justices who ruled on the validity of the first conviction would not have reversed that conviction is wholly without merit. The fact that judges disagree on the constitutional propriety of police conduct does not make it legally proper or reasonable.[8] For example, the fact that four Justices of this Court conclude in a dissent that the police acted reasonably in searching a defendant or his effects does not mean that the police did act reasonably for Fourth Amendment purposes. Moreover, the State's judicial-disagreement argument does not speak at all to the subjective aspect of the "good faith" issue on which the Court of Appeals properly focused. (See Division III, supra).[9]

D. In sum, whether good faith is an objective or subjective question, the Court of Appeals was correct in concluding that Leaming was not shown to have acted in good faith.

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[8] In addition, the assertions by the State and the Iowa Supreme Court that the courts have been "closely divided" on the propriety of Leaming's conduct (Pet. at 13, 285 N.W. 2d at 260) are misleading. In fact, all of the justices of the Iowa Supreme Court who voted to affirm Respondent's first conviction did so on the basis that Williams had waived his Fifth and Sixth Amendment rights by speaking. 182 N.W. 2d at 405. Similarly, Judge Webster's dissent in the Eighth Circuit review of the first conviction was based on the waiver issue. 509 F.2d at 234-237. Hence, the division of judicial opinion on the question of the propriety of Leaming's conduct -- as opposed to the constitutional effect of Williams' conduct -- was not nearly as close as the Iowa Supreme Court suggested.

[9] The State's suggestion that it is "not inconceivable" that it could show "good faith" if given another opportunity to do so (Pet. at 10) is totally without merit -- quite apart from the fact that the State has already had such an opportunity (See Division I, supra). The State suggests no additional evidence that it might present on the good faith issue, and its arguments based on the record speak only to the issue of whether Leaming violated Williams' Sixth Amendment rights -- an issue which this Court already has decided. 430 U.S. at 397-401.

V. THE RECORD DOES NOT SHOW THAT THE VICTIM'S BODY WOULD HAVE BEEN FOUND IF RESPONDENT'S CONSTITUTIONAL RIGHTS HAD NOT BEEN VIOLATED.

The preceding paragraphs demonstrate that the Court of Appeals' decision concerning Leaming's lack of good faith was legally and factually correct. Even if this were not the case, however, a grant of certiorari would be inappropriate in this case because even if an inevitable discovery doctrine without a good faith element were applied to the record, the result reached by the Court of Appeals would be upheld.

In concluding that the victim's body, and the evidence connected therewith, probably would have been discovered "in any event," the Iowa Supreme Court found (1) that an organized search for the victim would have extended into Polk County, to the area where the body was found, and (2) that the searchers would have seen the body because it was highly visible. 285 N.W. 2d at 262. Even under a "preponderance of the evidence" standard,[10] however, neither of these conclusions was correct.

A. The Search Would Not Have Extended Into Polk County, Where the Body was Located.

On December 26, 1968, a group of volunteer searchers under the direction of Iowa Bureau of Criminal Investigation (BCI) agents Ruxlow and Mayer searched Poweshiek and Jasper Counties (both located east of Polk County) for the victim's body. They discontinued the search at the Polk County border at 3:00 p.m., before Williams indicated he would take Leaming to the body. At the suppression hearing preceding the second trial, Ruxlow testified that he intended to continue the search into Polk County. However, all of the other eivdence in this record directly contradicts this testimony (which Ruxlow gave after being informed by the prosecuting attorney that the issue at the suppression hearing would be whether he would have discovered the body if Williams had not led the police to it. Ruxlow Depo. Tr. at 30):

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[10] Under United States v. Wade, 388 U.S. 218 (1967), the proper standard would be "clear and convincing evidence."

1. Both Ruxlow's BCI Report (Ex. 11) and Mayer's BCI Report (Ex. 12) specified that the search was to be conducted in Jasper and Poweshiek Counties; neither report even mentioned Polk County. Moreover, Ruxlow made extensive preparations to search Jasper and Poweshiek Counties, but none to search Polk County.

2. The circumstances of the abandonment of the search also clearly demonstrate that there was never any intent to search in Polk County. At 3:00 p.m. on December 26, the searchers were approaching the Polk/Jasper County border, having already completed the planned search of Poweshiek County. (1977 Suppression Tr. at 59). At that time, Ruxlow and Mayer received a radio message to meet other law enforcement officers at Interstate 80. They did so, leaving no one in charge of the search, and not knowing how long they would be gone. (1977 Suppression Tr. at 51-52, 59; Ruxlow Depo. Tr. at 20). When Ruxlow and Mayer arrived at I-80, Leaming requested that they follow him as he proceeded west; at this time, Ruxlow had no information that Williams would lead the officers to the victim, and he did not know why he was following Leaming or how long he would be doing so. (Ruxlow Depo. Tr. at 25-28). Nevertheless, Ruxlow followed Leaming.

Obviously, if Ruxlow had intended to continue the search into Polk County, it would not have made sense for him to abandon the search to follow Leaming, for no known purpose and for an unknown length of time, when there were still two hours of daylight left and a group of searchers was already organized and available. Especially in light of all the other circumstances, the fact that Ruxlow and Mayer left Grinnell precisely at the time that the search of Jasper County was being concluded is too "neat" a coincidence to be explainable on any other basis than that the intent was to search only Poweshiek and Jasper Counties, and that Ruxlow and Mayer decided to leave Grinnell to follow Leaming at 3:00 p.m. because they knew at that time that the searchers were about to

complete the planned search. Certainly the prosecution did not meet its burden of showing, even by a preponderance of the evidence, that the search would have continued into Polk County.

B. Even if the Search Had Extended Into Polk County, the Searchers Would Not Have Found the Body.

Even if the search had extended into Polk County, the record demonstrates that the searchers would not have found the body, for two main reasons:

1. Even if the searchers had left their vehicles to search on foot, they would not have seen the body, which was completely hidden under a cover of snow and brush. (See District Court Ex. 1). In finding that the body would have been visible to the searchers, the Iowa Supreme Court relied on the only two photographic exhibits then in the record (District Court Exhibits 3 and 5), which the court believed showed the body as it appeared when the police first discovered it with Williams' help:

> The State also introduced photographs showing the body as it was actually found. These photographs show that Pamela Powers' body would not have been hidden by the inch of snow which accumulated in the area in the evening of December 26 . . . . In addition the left leg of the body was poised midair, where it would not have been readily covered by a subsequent snowfall.

State v. Williams, supra, 285 N.W. 2d at 262 (emphasis added). The court apparently based this belief on Ruxlow's testimony at the suppression hearing that Exhibit 5 showed the body exactly as it was found. (1977 Suppression Tr. at 42).[11]

However, additional evidence introduced in the District Court established beyond question that Exhibits 3 and 5 did not show the body as it was found, and thus that the Iowa Supreme Court's belief was incorrect:

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[11] Mr. Ruxlow's suppression testimony refers to State's Exhibits C and D. These were introduced in the District Court as Petitioner's Exhibits 3 and 5.

(a) In the habeas corpus proceeding, Ruxlow conceded that Exhibit 5 was taken after the scene had been altered and snow had been removed. (Ruxlow Depo. Tr. at 17). Quite apart from this concession, Exhibit 1 -- which was not available to the defense in the state court proceedings (Dist. Ct. Tr. at 9-12) -- demonstrated clearly that Exhibit 5 could not possibly show the body as it was found: While Exhibit 5 shows the body almost completely exposed to view, Exhibit 1 shows the body completely covered with a blanket of snow and obscured by brush. (See Appendix, pp. A1, A2, supra).

(b) The record also demonstrates that Exhibit 3, (the second photograph introduced at the 1977 suppression hearing) did not show the body as it was found. After the body was found, a police officer took a single initial photograph of the body as it then appeared. After this first photograph was taken, the body was moved and the scene was altered. (Ex. 13 at 189; 1977 Suppression Tr. at 22-23). Exhibit 1, in which the body is virtually indiscernible, must be the single initial photograph. Thus, all the other photographs were taken after the scene had been disturbed.

2. The preceding paragraphs show that it is unlikely the body would have been discovered even assuming that searchers would have left their vehicles in the area where the body was located. The record shows, however, that this assumption is unwarranted. Ruxlow testified that the searchers generally searched from their vehicles; if they saw a "culvert or any out-building of an abandoned farm," they were supposed to get out of their cars. (1977 Suppression Tr. at 47-48). District Court Exhibits 7, 8 and 9 were photographs taken from the road approaching the culvert where the body was located. Although all of these photographs show the location of the culvert, it is not visible in any of them. The searchers therefore would not have left their cars to search, and would not have found the body even if it had been more

visible than Exhibit 1 shows it was.[12]

VI. THIS IS NOT AN APPROPRIATE CASE FOR THE EXTENSION OF STONE V. POWELL OUTSIDE THE FOURTH AMENDMENT CONTEXT.

The State's final argument for the granting of certiorari is that this case "raises the applicability of the doctrine of Stone v. Powell, 428 U.S. 465 [(1976)], in a non-Fourth Amendment context" (Pet. at 13), and that Stone v. Powell should be extended to preclude litigation of the Sixth Amendment violations at issue in this case (Pet. at 13-16). This argument is without merit, for two independently sufficient reasons: (A) the rationale of Stone v. Powell plainly does not apply to Sixth Amendment violations, especially those committed in bad faith; and (B) even if Stone v. Powell were applied to the instant case, it would not bar federal-court review of Williams' federal constitutional claims on their merits.

A. The Rationale of Stone v. Powell Does Not Apply to This Case.

In Stone v. Powell, supra, this Court held that a state prisoner who had been afforded a full and fair opportunity to litigate Fourth Amendment exclusionary-rule claims in the state courts

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[12] Since the conclusion that the State did not demonstrate that the body would have been discovered in the absence of the violation of Williams' constitutional rights is contrary to that reached by the Iowa Supreme Court, some brief attention to 28 U.S.C. §2254(d) is appropriate. Normally, state court factual findings are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C. §2254(d); Sumner v. Mata, 449 U.S. 539 (1981). However, this presumption of correctness does not apply when "the material facts were not adequately developed at the state court hearing" or when the petitioner "did not receive a full, fair and adequate hearing in the state court proceeding . . . ." 28 U.S.C. §2254(d)(3), (6); Townsend v. Sain, 372 U.S. 293 (1963). Given the additional evidence presented in the District Court, both of these exceptions apply. Most importantly, Exhibit 1 and Ruxlow's new testimony made it clear that the Iowa Supreme Court had relied on false and highly misleading testimony in finding that the body was visible. Moreover, the state courts were not presented with District Court Exhibits 7-9, 11, 12, or 16 -- all of which indicated that the victim's body would not have been found.

could not relitigate those claims in a federal habeas corpus proceeding. This holding was carefully limited to its Fourth Amendment context, and was based on the fact that the primary justification for applying a judicially-created exclusionary rule to Fourth Amendment violations is the general deterrence of future violations of the Fourth Amendment by law enforcement officers. 428 U.S. at 479, 486. The Stone opinion specifically noted the very limited role of the "imperative of judicial integrity" in Fourth Amendment exclusionary rule cases, 428 U.S. at 484-85, and made it clear that in the context of the Fourth Amendment, the exclusionary rule "is not a personal constitutional right" that is calculated to redress injury to any particular defendant in relation to the criminal judicial process. Rather, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." 414 U.S. 338, 348 (1974).

Given the primarily deterrent purpose of the Fourth Amendment exclusionary rule, permitting relitigation of Fourth Amendment claims in a federal habeas corpus proceeding after a full and fair opportunity to litigate those claims in state court is not justified because the incremental deterrent effect of doing so, if any, is small. 428 U.S. at 493. As this Court's opinion in Stone v. Powell itself indicated, however, denials of Fifth and Sixth Amendment rights are different in kind from Fourth Amendment violations in that they directly impugn the integrity of the judicial process. 428 U.S. at 479. One serious difficulty with the Stone v. Powell argument presented by the amici curiae in this case is that it relies on assertions that the "alleged [sic] constitutional violation occurred at the time of arrest and prior to indictment and the commencement of trial." (Illinois Amicus Brief at 4, 9). These assertions may be technically accurate; but they ignore the fact that this Court already has held that the Sixth Amendment violations in this case occurred after the com-

mencement of judicial proceedings, 430 U.S. at 398-399 (as Sixth Amendment violations must, see Kirby v. Illinois, 406 U.S. 682 (1972)). Once judicial proceedings have commenced, even at the pretrial stages, the Sixth Amendment right to the assistance of counsel of course "is indispensable to the fair administration of our adversary system of criminal justice." 430 U.S. at 398.

Thus, unlike the Fourth Amendment, the Sixth Amendment does protect "personal constitutional rights," and Sixth Amendment violations directly affect the judicial process in a manner that makes inappropriate the extension of Stone v. Powell to such violations.[13] This is especially so with regard to bad faith Sixth Amendment violations, which strike with particular force at the integrity of the judicial process.

This conclusion is supported by the post-Stone decisions of this Court and of the Federal circuit courts. In Rose v. Mitchell, 443 U.S. 549 (1979), this Court declined to extend Stone beyond the Fourth Amendment to a claim by state prisoners that their convictions should be overturned because of discrimination in the selection of grand jury foremen -- even though this claim did not implicate the integrity of the fact-finding process by which they had been found guilty. Reaffirming the "limited reach of Stone," 443 U.S. at 560, this Court noted that Rose involved a claimed violation of personal rights, and that the "judicial integrity" concerns and constitutional interests were more compelling than in Stone because the claimed violations struck at "core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system." 443 U.S. at 563, 564. As noted previously, the instant case similarly involves violations of

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[13] Since the Fifth Amendment explicitly prohibits the use of compelled testimony in criminal proceedings, violations of the Fifth Amendment also directly implicate the integrity of the judicial process. In this connection, it should be noted that the District Court in the first habeas corpus proceeding held that Williams' Fifth Amendment rights were violated, in two respects. 375 F. Supp. at 179-184. This holding has never been reversed.

personal rights that strike at fundamental values of the adversary system.

Consistently with Rose, every federal circuit court faced with the issue has declined to extend Stone v. Powell to Fifth and Sixth Amendment claims. See, e.g., White v. Finkbeiner, 687 F.2d 805 (7th Cir. 1982); Hinman v. McCarthy, 676 F.2d 343, 348-49 (9th Cir.), cert. denied, 103 S.Ct. 468 (1982); Patterson v. Warden, 624 F.2d 69, 70 (9th Cir. 1980); Harryman v. Estelle, 616 F.2d 870, 872 (5th Cir. 1980), cert. denied, 449 U.S. 860 (1981); Morgan v. Hall, 569 F.2d 1161, 1168-69 (1st Cir.), cert. denied, 437 U.S. 910 (1978).

A few final words regarding the applicability of Stone v. Powell to the Sixth Amendment violation in this case are necessitated by the assertion by the amici that Williams' guilt "was not in question" (Illinois Amicus Brief at 9). Quite apart from the fact that nothing in Stone would suggest that the apparent guilt of a defendant by itself would preclude federal habeas corpus review of bad faith Sixth Amendment violations, the suggestion of the amici that Williams' guilt was not questioned simply is not factually correct. Although Williams' guilt may have appeared clear on the record from the first trial, see 430 U.S. at 428, 437, 441, the Court of Appeals specifically noted that at the second trial, Williams' defense -- that someone else killed the victim and placed her body in his room -- was supported by substantial physical and scientific evidence indicating, inter alia, that the perpetrator, unlike Williams, was sterile. 700 F.2d at

1168 (Pet. at A7-A8).[14] Thus, even if the theory that the apparent guilt of a defendant would justify ignoring bad faith Sixth Amendment violations were valid, it would not apply to this case.

B. Even if Stone v. Powell Were Extended to the Instant Case, It Would Not Bar Federal Habeas Corpus Review of the Fifth and Sixth Amendment Claims.

Under Stone v. Powell, federal habeas corpus review of Fourth Amendment claims is barred only if the defendant has had a "full and fair" opportunity to litigate those claims in the state courts. In the instant case, however, Williams did not have such an opportunity, for at least two reasons. First, the state trial judge who heard the motion to suppress indicated to defense counsel that he expected his ruling to be reversed on appeal, apparently because of what he regarded as the less-than-adequate record made by the prosecution. (Dist. Ct. Ex. 17). Certainly it cannot be said that a defendant has had a full and fair hearing on a suppression motion when the judge who heard the matter himself believes he will be reversed. Moreover, as Division V, supra, has discussed in more detail, additional evidence presented in the

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[14] In this regard, it also should be noted that additional evidence presented to the District Court with reference to one of the issues not addressed by the Court of Appeals also strongly supported Williams' defense. That evidence consisted of the deposition testimony of Richard Boucher, who was a resident of the Des Moines YMCA on the day of the crime. At about the time of the crime, Mr. Boucher heard suspicious, belligerent noises from the room next to his; he recognized the voice of Albert Bowers, a maintenance man who was responsible for cleaning restrooms and residence rooms at the YMCA. Mr. Boucher later saw Bowers taking suitcases into his room, and then heard sounds of packing. When Mr. Boucher and a police officer went to Bowers' room to ask him not to leave, Bowers indicated he was not going anywhere. However, his bags were hidden under his bed, and he left the YMCA shortly thereafter. Boucher subsequently found a towel in Bowers' room that appeared to have bloodstains on it. (Iowa Supreme Court Appendix, also introduced in the District Court, at 153-174). Inexplicably, the Boucher testimony was not offered at trial.

District Court demonstrated that the Iowa Supreme Court, in concluding that the State had satisfied its hypothetical inevitable discovery test, relied on evidence that was seriously misleading. Since the failure to present this additional evidence to the state courts was excusable, the Iowa Supreme Court's misapprehension of the facts rendered its consideration of the suppression issue less than "full and fair." Consequently, whether Stone v. Powell should be extended beyond its Fourteenth Amendment context is a moot issue in the instant case, and this Court therefore should not consider it.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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Certificate of Service

The undersigned hereby certifies that he received the petition for a writ of certiorari in this case on April 12, 1983, and that on the 12th day of May, 1983, he deposited one copy of the foregoing document in a United States Post Office, with first-class postage prepaid, and addressed to counsel for the petitioner:

Mr. Brent R. Appel
Deputy Attorney General
Hoover Office Building
Des Moines, Iowa 50319

The undersigned further certifies that all parties required to be served have been served.

ROBERT BAPTELS

82-1651

NO. 82-1651

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The respondent, Robert Anthony Williams, who is now held in the Iowa State Penitentiary at Fort Madison, Iowa, hereby asks leave to proceed in this action in forma pauperis pursuant to Supreme Court Rule 46.1 and 18 U.S.C. §3006A(d)(6).

The respondent was permitted to proceed in forma pauperis with appointed counsel in the District Court and the Court of Appeals, pursuant to 18 U.S.C. §3006A(d)(6).

/s/

ROBERT BARTELS
College of Law
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Tempe, Arizona 85287
(602) 965-7053
Counsel for Respondent

Certificate of Service

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ROBERT BARTELS